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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY,
Petitioners,

vs.

SIDNEY H. CANTWELL, JR.,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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QUESTION PRESENTED

This petition presents one question for review: Does 10 U.S.C. Section 1336 prevail over California law and authorize an individual to receive credit in a local public retirement system for active military service notwithstanding that California law prohibits such credit when the individual is also entitled to a pension from the federal government for such service?

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COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY,
Petitioners,

VS.

SIDNEY H. CANTWELL, JR.,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

The Petitioners, County of San Mateo, a political subdivision of the State of California, and the Retirement Board of San Mateo County respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 31, 1980.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto at pp. A-1-A-18, *infra.*, and is reported at 631 F. 2d 631 (9th Cir. 1980).

The Memorandum of Decision, Judgment In Favor of Plaintiff For Declaratory Relief, Order, Order Fixing Certain Terms of Final Judgment, and Supplemental

Judgment of the District Court for the Northern District of California, which are unreported, appear in the appendix hereto at pp. A-19 through A-56, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on October 31, 1980. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 10, Section 1336, states:

> "No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it."

California Government Code Section 31641.4 provides in relevant part:

> "A member shall receive credit for employment in public service only for such service as he is not entitled to receive a pension or retirement allowance from such public agency. The service for which he elects to contribute and the fact that no pension or retirement allowance will accrue to such member by virtue of his employment in such public agency must be certified to by an officer of the public agency where he rendered such public service or must be established to the satisfaction of the board . . ."

Tenth Amendment, United States Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Petitioner County of San Mateo is a political subdivision of the State of California and has established a retirement system for its employees under the County Employees Retirement Law of 1937 (California Government Code Sections 31450, et seq.). The management of the retirement system is vested in Petitioner Board of Retirement of San Mateo County[1] established under California Government Code Section 31520.

Any member of the County retirement system who was in public service before becoming a member may elect to receive credit in the system for all allowed public service time. (California Government Code Section 31641.1.) The member must file written notice of such election with the County and must contribute to the retirement system an amount of money calculated in accordance with California Government Code Section 31641.2. A member may receive credit in the County retirement system only for that public service for which he is not entitled to receive a pension or retirement allowance from another public agency. (California Government Code Section 31641.4) Since the years of service credited to a member is one of the factors used to compute his retirement allowance, a member who makes the necessary con-

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[1]Petitioners County of San Mateo and Board of Retirement of San Mateo County will hereinafter be referred to jointly as "the County".

tributions and receives credit for previous public service will receive a higher retirement allowance than if he did not do so. (See California Government Code Sections 31457, 31471, 31473, and 31676.1.) A member who has 30 years' service is not required to make any additional contributions to the retirement system. California Government Code Section 31625.2. The years of previous public service for which a member receives credit are included in determining when the member has 30 years' service and is eligible to have his contributions discontinued.

Respondent was employed by the County in April of 1948, and he has been a member of the County retirement system since May 14, 1948. Prior to his employment by the County, respondent served on active duty with the United States Navy from January 6, 1943 to October 3, 1946, for a total of 3 years, 8 months, and 27 days. After he left active duty, respondent continued to serve in the Naval Reserve from October 3, 1946 until October of 1968. His total active and reserve Naval service is 26 years and 1 month.

Pursuant to 10 U.S.C. Sections 1331, et seq., respondent is entitled upon application to retired pay under 10 U.S.C. Section 1401 upon reaching age 60. Under 10 U.S.C. Sections 1333 and 1401, respondent's days of active military service will be included in computing his retired pay from the United States.

In 1975, respondent submitted a written notice to the Administrator of the County retirement system indicating his desire to receive credit for his active military service. He contended that he was eligible under 10 U.S.C.

Section 1336 to receive credit for his active military service despite the fact that he was also entitled to a pension from the federal government for the same service. The County formally denied respondent's request on May 13, 1976, relying on California Government Code Section 31641.4.

Respondent then commenced this action by filing a complaint for declaratory relief with United States District Court, Northern District of California, for the purpose of obtaining a declaration of his rights under 10 U.S.C. Section 1336. The complaint sought a judicial declaration that respondent was entitled to receive credit for his active military service in the County's retirement system and that he was entitled to reimbursement for any contributions made by him to the system after he had credit for thirty years of service. Jurisdiction was asserted under 28 U.S.C. Section 1331(a).

The case was tried on the basis of an agreed statement of facts and memoranda of law submitted by both parties. The District Court held that California Government Code Section 31641.4, standing alone, precluded respondent from receiving credit for his active military service in the County's retirement system. However, the Court found that the provisions of 10 U.S.C. Section 1336 authorized respondent to receive such credit upon making the necessary contributions and that Section 1336 prevailed over California Government Code Section 31641.4 by virtue of the Supremacy Clause of the United States Constitution, Article VI, Clause 2. Following the County's motion to amend the judgment, the Court also held that respondent

was entitled to have his contributions to the County's retirement system discontinued as of August 17, 1974 and that he should recover damages by way of reimbursement for all amounts he contributed after that date. The Court refused to grant respondent's request for his attorney's fees.

The Court of Appeals for the Ninth Circuit affirmed, except the judgment of the District Court was modified to provide that respondent was entitled to have his contributions to the County's retirement system discontinued only as of December 11, 1975.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue in this case because the decision of the court below involves an issue not yet resolved by this Court, namely, the extent to which Congress may affect integral state functions under Article I, Section 8, Clauses 12 and 13 of the Constitution without violating the Tenth Amendment

In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act which extended the Act's minimum wage and maximum hour provisions to employees of States and their political subdivisions were an invalid exercise of Congress's Commerce Clause authority insofar as the amendments operated to displace directly the State's freedom to structure integral operations in areas of traditional governmental functions. In *National League of Cities,* this Court stated:

> "One undoubted attribute of State Sovereignty is the State's power to determine the wages which shall be

> paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." (426 U.S. at 845.)

The legislation in question in *National League of Cities* was enacted by Congress under the Commerce Clause, Article I, Section 8, Clause 3. No view was expressed concerning whether or not different results might obtain if Congress sought to affect integral operations of State governments by exercising authority granted it under other sections of the Constitution. (426 U.S. at 852, fn. 17.) And this Court expressly stated that nothing in the *National League of Cities* decision was intended to address the scope of Congress's authority under its war power. (426 U.S. at 833, fn. 18.)

The Court below acknowledged that 10 U.S.C. Section 1336 interfered with the same traditional state function considered by this Court in *National League of Cities,* namely, the state's power to determine the compensation (in this case, in the form of pension benefits) of its employees. However, the Court distinguished *National League of Cities* from this case on the ground that 10 U.S.C. Section 1336 was enacted by Congress under Article I, Section 8, Clauses 12 and 13, and not under the Commerce Clause. Therefore, the Court rejected the County's argument that under the reasoning of the *National League of Cities* decision, 10 U.S.C. Section 1336 constituted an invalid exercise of Congressional authority insofar as it conflicted with California Government Code Section 31641.4.

The County submits that its petition for a writ of certiorari should be granted because the decision of the Ninth Circuit involves an issue expressly left undecided by this Court in *National League of Cities*, namely, the extent to which Congress may exercise its power under other sections of the Constitution (in this case, Article I, Section 8, Clauses 12 and 13) to affect integral operations of State governments. Furthermore, the decision of the Court below, although not directly in conflict with the holding of this Court in *National League of Cities*, does conflict in principle with the reasoning of the *National League of Cities* decision. Finally, if the Court below is correct, then Congress will now be able to overstep the bounds of the Tenth Amendment at will and interfere directly with traditional state functions simply by purporting to exercise its power under a Constitutional provision other than the Commerce Clause.

Following the *National League of Cities* decision, several courts below have indicated that this Court's holding may be limited to the exercise of powers by Congress under the Commerce Clause and that other sections of the Constitution may support federal intrusions into integral state operations which the Tenth Amendment would prohibit if grounded on the Commerce Clause. (See, e.g., *Jennings v. Illinois Office of Education*, 589 F. 2d 935, 937-938 (7th Cir. 1979); *Marshall v. Owensboro-Daviess County Hospital*, 581 F. 2d 116, 119 (6th Cir. 1978); *Arritt v. Grisell*, 567 F. 2d 1267, 1270 (4th Cir. 1977). This appears to be the basis for the decision of the Court below.

The County submits that it was incorrect for the Court below merely to distinguish the instant case on the ground that 10 U.S.C. Section 1336 was enacted under Congress's war power and not the Commerce Clause and, hence, the *National League of Cities* decision did not apply. The principles of federalism inherent in the Tenth Amendment which formed the basis for this Court's decision in *National League of Cities* required the Court below to engage in a more detailed analysis. Specifically, once the Court determined that Congress had the constitutional authority to enact 10 U.S.C. Section 1336, it should then have addressed the questions of whether or not the restrictions imposed by Congress upon the County and the States were much greater than was essential to accomplish the purposes of Section 1336 and, further, whether such restrictions violated the Tenth Amendment by resulting in a direct interference with the traditional state function of providing retirement benefits for state employees. This Court should grant certiorari in order to address these questions and clarify that the policies of federalism underlying the decision in *National League of Cities* must be considered by the courts whenever any Congressional enactment, no matter what its constitutional source, affects state or local governments and that the courts must balance the exercise of the congressional power with the degree of interference with integral state functions.[2]

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[2]At least one Court of Appeals has adopted this balancing approach. See *Peel v. Florida Department of Transportation*, 600 F. 2d 1070, 1082-1084 (5th Cir. 1979). The court in *Peel* upheld the application of the Veterans' Reemployment Rights Act to the states.

Application of this balancing approach would clearly invalidate the decision of the court below. The primary purpose of 10 U.S.C. Sections 1331, et seq., was to induce individuals to remain in the reserves. The establishment by Congress of a retirement system for members of the reserves would have been sufficient to accomplish this purpose. But the application of 10 U.S.C. Section 1336 to the County's retirement system goes far beyond the purposes for which it was enacted and results in the direct interference by the federal government with the traditional state function of providing retirement benefits for state employees. Such an application will result in substantial increased costs to the County, since the County will be required to appropriate the funds necessary to purchase respondent's increased retirement allowance. More importantly, the decision frustrates the legitimate state purpose of prohibiting public employees from receiving credit in two public retirement systems for the same period of service rendered to only one public agency. Even Congress has recognized that persons should not be allowed to receive credit for the same period of service in two retirement systems and has enacted laws to prevent such double credit in certain instances. (See 5 U.S.C. Sections 8332(c)[3] and 8332(d)(2)).

The County submits that the Court of Appeals should not have interpreted 10 U.S.C. Section 1336 to apply to the states and their political subdivisions. Such an inter-

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[3]Congress does allow individuals such as respondent to receive double credit. See 5 U.S.C. Section 8332(c)(2). The County submits that Congress should not be allowed to require the County to do so as well.

pretation was unnecessary to further the Congressional purpose in enacting that section. Furthermore, application of 10 U.S.C. Section 1336 directly to the states and their political subdivisions results in just the sort of direct interference by the federal government with the traditional state function of providing compensation and retirement benefits for its employees which this Court struck down in *National League of Cities.*

CONCLUSION

For these reasons, the County respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 31, 1980.

Dated: January 30, 1981

Respectfully submitted,

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(Appendices follows)

Appendix A

United States Court of Appeal
For the Ninth Circuit

Sidney H. Cantwell, Jr., Plaintiff-Appellee, v. County of San Mateo, a political subdivision of the State of California, and the Retirement Board of San Mateo County. Defendants-Appellants.	No. 78-1765
Sidney H. Cantwell, Jr. Plaintiff-Appellant, v. County of San Mateo, a political subdivision of the State of California and the Retirement Board of San Mateo County. Defendants-Appellees.	No. 78-1820 D.C. No. C 76-1258 GBH

[Filed October 3, 1980]

Appeal from the United States District Court
for the Northern District of California
Honorable George B. Harris, Presiding
Argued and Submitted May 15, 1980

OPINION

Before: HUG and ALARCON, Circuit Judges, and BLUMENFELD*, District Judge.

*The Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

HUG, Circuit Judge:

The principal issue in this appeal involves the resolution of an apparent conflict between federal statutes granting retirement pay to military reserve personnel and California statutes establishing retirement plans for county employees. The appellants, the County of San Mateo ("County") and the Retirement Board of San Mateo County ("Board"), challenge the district court's decision determining that the federal statutes were controlling. The County also contends that the district court erred in determining the date as of which the appellee, Sidney H. Cantwell, Jr., was entitled to have deductions from his salary to the retirement fund discontinued. Cantwell appeals the denial of his request for an award of attorneys' fees.

I

Cantwell has been continuously employed by the County as an engineer since April, 1948. He has been a member of the San Mateo County Employees Retirement Association ("Association") since 1948. The benefits Cantwell will receive and the requirements he must fulfill as a member of the Association are set forth in the County Employees Retirement Law of 1937, Cal. Gov't Code §§ 31450-31898.

Prior to his employment by the County, Cantwell had served on active duty in the United States Navy from January 6, 1943 to October 3, 1946, a total of 3 years, 8 months and 27 days. After leaving active Navy service, Cantwell served in the United States Naval Reserve until October, 1968, the last 20 years and 6 months of which was concurrent with his County employment.

Cantwell brought this action claiming that the County had denied him credit for his prior active Navy service to which he claims he was entitled under Cal. Gov't Code §§ 31641.1 and 31641.2.[1] These sections allow members of county retirement systems to receive credit for prior public service. The County refused to allow Cantwell to receive such credit based on Cal. Gov't Code § 31641.4,[2] which pro-

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[1]Cal. Gov't Code § 31641.1 provides:

> A member who was in public service before becoming a member may elect by written notice filed with the board to make contributions pursuant to Section 31641.2 and to receive credit in the retirement system for all allowed public service time. Credit for part-time service shall be calculated as provided in Section 31641.5.

Cal. Gov't Code § 31641.2 provides:

> Any member of the retirement system who elects pursuant to Section 31641.1 to make contributions and receive credit as service for time for which he claims credit because of public service shall contribute to the retirement fund, prior to the effective date of his retirement, by lump sum payment or by installment payments over a period not to exceed five years, an amount equal to the sum of:
>
> (a) Twice the contributions he would have made to the retirement fund if he had been a member during the same length of time as that for which he has elected to receive credit as service, computed by applying the rate of contribution first applicable to him upon commencement of his membership in this system to the monthly compensation first earnable by him at the time as provided in Section 31641.3, multiplied by the number of months for which he has elected to receive credit for county service, including time, if any, prior to the establishment of the system, and which will constitute current service under this system.
>
> • • • •

[2]Cal. Gov't Code § 31641.4 provides:

> A member shall receive credit for employment in public service only for such service as he is not entitled to receive

vides that credit for prior public service is to be allowed only if the employee is not entitled to receive a pension from the public agency for which the employee previously worked. Cantwell asserted that 10 U.S.C. § 1336[3] prevents the County from denying him credit for his active Navy service, despite Cal. Gov't Code § 31641.4.

II

The district court found a conflict between the federal and the state statute, in that 10 U.S.C. § 1336 authorizes credit in both pension plans for the active service, while Cal. Gov't Code § 31641.4 denies such double credit. The court held that under the supremacy clause of the United States Constitution, art. VI, cl. 2, the federal statute must prevail; otherwise, the congressional policy of encouraging and rewarding military reserve service would be frustrated.

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a pension or retirement allowance from such public agency. The service for which he elects to contribute and the fact that no pension or retirement allowance will accrue to such member by virtue of his employment in such public agency must be certified to by an officer of the public agency where he rendered such public service or must be established to the satisfaction of the board.

[3]The statutes governing retired pay for non-regular (reserve) military service are contained in Chapter 67 of Title 10 of the United States Code, 10 U.S.C. § 1336, which is a part of this chapter provides:

> No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.

Pursuant to 10 U.S.C. § 1332, Cantwell's period of active service will be included in computing his pension for his reserve service.

On appeal, the County presents three arguments opposing the district court's decision that section 1336 of the federal statute must prevail. The first contention is that the language in section 1336 which requires that the service "otherwise properly credited," shows on its face that section 1336 does not apply to Cantwell's active service because it is not "properly credited" under Cal. Gov't Code § 31641.4.

In the context of interpreting statutory language, this court has recently stated:

> While there may be instances where the language of a statute is so lucid on a particular issue that resorting to legislative history would be inappropriate . . ., such a rule is not normally applicable where . . . the court must construe the meaning of an undefined term in a statute when the term used does not consist of words of art.

Church of Scientology v. United States Department of Justice, 612 F.2d 417, 421 (9th Cir. 1979). If the plain meaning of statutory language leads to a result contrary to or at variance with the statutory purpose, this court will look to legislative history or other extrinsic aids so that the legislative purpose may be fulfilled. *Id.* at 420-422.

At first glance the County's reliance on the phrase "if otherwise properly credited" appears to have merit. Such an interpretation would have the effect of rendering section 1336 meaningless, however, because it would allow any state to circumvent section 1336 merely by passing a law denying membership in a retirement system to anyone eligible to receive a reserve pension. This would frustrate

the congressional purpose underlying the reserve pension system and section 1336.

We have searched in vain for pertinent legislative history of section 1336 or for any cases directly interpreting it. The purpose in enacting the overall retirement pay program for reserve personnel is clearly, however, "to provide an inducement to qualified personnel to remain active in the Reserves in order to maintain a cadre of trained soldiers for use in active duty if the need should arise." *Alexander v. Fioto,* 430 U.S. 634, 639 (1977) (footnote omitted). "One of the specific inducements to these part-time servicemen (many of whom worked for the Federal Government) was to allow them to count concurrent periods of federal civilian service and of military duty for both civilian and military retirement." *Merrill v. United States,* 338 F.2d 372, 375 (Ct. Cl. 1964).

Adopting the County's interpretation of the language of section 1336 would undermine the purpose of the retirement pay program for reserve personnel. Congress intended that periods of service used in computing retirement pay under Chapter 67 could not be excluded from retirement programs established by other laws solely because the reservist would also receive a Chapter 67 pension.[4] Such an intent is consistent with the language "if otherwise

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[4]The only reason the County gave for refusing to credit Cantwell for his active service is because he will receive a pension for it. That is the same position taken by the California Attorney General in similar cases. *See* 30 Op. Att'y Gen. Cal. 49 (1957).

properly credited."[5] We conclude that "otherwise" refers to any criteria the other pension plan may impose except for the fact that a person is receiving a pension under Chapter 67.[6] Therefore, 10 U.S.C. § 1336 does conflict with Cal. Gov't Code § 31641.4, because section 1336 requires that double credit for Cantwell's active service be given him in both his retirement plans and section 31641.4 denies

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[5]When originally enacted in 1948, section 1336 read:

. . .

> No period of service otherwise creditable in determining the eligibility of any person to receive, or the amount of, any annuity, pension, or old-age benefit payable under any provision of law on account of civilian employment, in the Federal Government or otherwise, shall be excluded in such determination because such period of service may be included, in whole or in part, in determining the eligibility of such person to receive, or the amount of, any retired pay payable under this title.

62 Stat. 1089 (1948). In 1956 the words "otherwise creditable" were changed to the present language. 70A Stat. 104.

[6]We find support for this conclusion in analogous statutes governing the federal employee retirement system. Prior military service is creditable in the federal system, in a manner similar to the California county system. The statute also provides that the military service may not be credited if the employee is awarded retired pay on account of the military service. However, the statute specifically permits inclusion of the military service, even though the person will receive a pension under Chapter 67 of Title 10. *See* 5 U.S.C. § 8332(c)(2). This is persuasive evidence of congressional intent that the service for which a person receives a pension under Chapter 67 may not be excluded on that basis alone from credit in another retirement system.

Any other construction of section 1336 might actually discourage membership in the reserves. Someone who has served on active duty but will not receive a pension for that service could receive credit under Cal. Gov't Code § 31641.4. The employee might choose not to join the reserves so that he could obtain credit in the California county pension system for the prior active service.

it. Having reached this conclusion, we must determine whether section 1336 prevails over the California statutes.

When federal legislation conflicts with state legislation this court has stated:

> State legislation must yield under the supremacy clause of the Constitution to the interests of the federal government when the legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs.

Rust v. Johnson, 597 F.2d 174, 179 (9th Cir.), *cert. denied,* 444 U.S. 964 (1979). *See also Jones v. Rath Packing Co.,* 430 U.S. 519, 525-26 (1977); *United States v. Brown,* 552 F.2d 817, 821 (8th Cir.), *cert. denied,* 431 U.S. 949 (1977). The military reserve retirement pay program was enacted pursuant to Congress's power to raise and maintain armies and a navy. U.S. Const. art. 1, § 8, cls. 12 and 13. Because the state statute is in conflict with the federal statute implementing that purpose, we agree with the district court that the federal legislation must prevail.

The County's second argument, which relies on *National League of Cities v. Usery,* 426 U.S. 833 (1976), is that even if section 1336 is interpreted as conflicting with the California statutes, it is invalid as an infringement of the state's rights under the tenth amendment to the United States Constitution. In *Usery* the Court considered the 1974 amendments to the Fair Labor Standards Act, which extended the Act's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. The Court held that the amendments directly

displaced "the States' freedom to structure integral operations in areas of traditional governmental functions," (i.e., the State's power to determine the wages it will pay to its employees, what hours the employees will work and how they will be compensated for overtime) and were, therefore, "not within the authority granted Congress by Art. I, § 8, cl. 3 [the Commerce Clause]." *Id.* at 852 (footnote omitted). The Court specifically limited its holding to the power of Congress under the Commerce Clause by stating:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

Id. at 852 n.17.

In the present case section 1336 affects the same state interest as in *Usery, i.e.*, the amount of compensation county employees receive (in this instance, in the form of pension benefits). As noted above, however, the authority under which Congress enacted section 1336 is not art. I, § 8, cl. 1, it is art. I § 8, cls. 12 and 13. This is the key distinction between this case and *Usery*. The Court in *Usery* noted that it was not overruling *Case v. Bowles*, 327 U.S. 92 (1946), in which the Court held that Congress could set maximum prices in order to carry on war even if this affected a state's sale of goods. *Usery*, 426 U.S. at 854-55 n.18. The Court specifically stated, "[n]othing we say in this opinion addresses the scope of Congress's authority under its war power." *Id.*

In *Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979), the Seventh Circuit considered the tenth amendment objections of the State of Illinois to the provisions of the Veterans' Reemployment Rights Act, which requires states to restore employees inducted into the United States Armed Forces pursuant to the Selective Service Act to their former positions following the person's discharge. Illinois had declined to restore Jennings to his former position following his discharge on the ground that no position was open at the time. The Court found authority for the Act under the war powers contained in art. I, § 8, cls. 11-13. *Id.* at 937. Relying on *Case v. Bowles*, which the court noted had explicitly not been overruled by *Usery*, the Court found the grant of war powers to be sufficient to sustain a statute that might otherwise violate the tenth amendment.

We adopt the reasoning of the Seventh Circuit in *Jennings* and of the Supreme Court in *Case v. Bowles*, and conclude that *Usery* is inapposite to the present case. Although the congressional power to declare war, art. I, § 8, cl. 11 is not directly involved in the present case, the power to raise and maintain armies and a navy, art. I, § 8, cls. 12 & 13, is so closely intertwined with that power that the rationale of *Case v. Bowles* and *Jennings* applies. We find that congressional power to pass section 1336 exists under art. I, § 8, cls. 11, 12 & 13, and conclude that the constitutional grant of these powers is sufficient to sustain section 1336 against a tenth amendment challenge. We note parenthetically that California could have chosen not to afford credit for any prior public service. Having chosen

to do so, however, it cannot do so in a manner which conflicts with section 1336.

The County's final argument against applicability of section 1336 is that it applies only when the reservist is employed by the Federal Government, and not when the person is employed by a state government. The County relies upon the above-quoted language of *Merrill v. United States*, 338 F.2d at 375 that one of the purposes of Chapter 67 was to allow employees "to count concurrent periods of federal civilian service and of military duty. . . ."

This argument is without merit for several reasons. The *Merrill* court did not indicate in any way that Chapter 67 applied only to federal civilian employment. As the district court pointed out, adopting the County's argument would be ignoring the words "civilian employment by the United States or otherwise" in section 1336. Such a construction would also ignore the words "under any other law."

For all the above reasons we agree with the district court that Cantwell is entitled to receive credit in the County retirement system for his 3 years, 8 months and 27 days of active Navy service.

III

When the period of Cantwell's prior Navy service is added to his employment period with the County, he has a total of 30 years' service as a member of the retirement system as of August 17, 1974. Because Cal. Gov't Code

§ 31625.2[7] states that no contributions shall be deducted from the salary of an employee having credit for 30 years' service, the district court ordered the County to refund to Cantwell the deductions which had been made from his salary since that date, provided that Cantwell made the appropriate contribution pursuant to Cal. Gov't Code § 31641.2 to receive credit for his Navy service.[8] Cantwell did not notify the County in writing that he desired to contribute and to receive credit for his active military service until November 17, 1975. The County contends that this was the first time Cantwell submitted the appropriate notice required by Cal. Gov't Code § 31641.1 to receive credit for prior service. The earliest the County could have approved the request would have been December 11, 1975, when the Board met, and thus, the County contends that if Cantwell is entitled to reimbursement, it is as of December 11, 1975. The County argues that only

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[7]Cal. Gov't Code § 31625.2 provides:

> Notwithstanding any other provisions of this chapter, contributions shall not be deducted from the salary of any member having credit for 30 years' service providing such member was a member on the effective date of this section and remained in membership continuously until credited with 30 years' service.

[8]The court found, and the parties agree, that the amount Cantwell would have to contribute would be $3,065.04. The amount which had been deducted that was to be reimbursed to Cantwell was $4,820.65. The court subsequently vacated for further consideration the portion of the order requiring reimbursement. After holding a further hearing, the court again determined that Cantwell was entitled to discontinuance of the contribution as of August 17, 1974. By the time of this supplemental decision, the amount deducted from Cantwell's salary had risen to $7,094.73, which the court again ordered the County to refund to Cantwell.

after Cantwell gave the written notice and made the appropriate contribution would he have had credit for the required 30 years of service under Cal. Gov't Code § 31641, which defines "service."[9]

The district court found that the August 17, 1974 date was proper because, although the elements of estoppel were not present, Cantwell's filing of a written notice would have been a futile act. The County does not dispute that it would have denied any such request. Cantwell expressed his belief orally on three separate occasions between April of 1967 and July of 1973 to the administrator of the County retirement system that he should be given credit for his prior Navy service. Each time Cantwell was told he was ineligible. Only later did Cantwell discover, and write the letter concerning, section 1336.

We agree with the County's argument on this point. Cal. Gov't Code § 31641.1 clearly requires an employee to file written notice of an election to make the contributions for prior credit. Section 31625.2 requires discontinuance of

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[9]Cal. Gov't Code § 31641 provides:

"Service" means uninterrupted employment of any person appointed or elected for that period of time:

(a) For which deductions are made from his earnable compensation from the county or district for such service while he is a member of the retirement association.

(b) In military service for which the county or district or member is authorized by other provisions of this chapter to make, and does make, contributions.

(c) For which he receives credit for county service or for public service or for both pursuant to the provisions of this article.

(d) Allowed for prior service.

contributions to the retirement system from an employee "having credit" for 30 years' service. An employee relying on prior service toward his 30 years' service cannot "have credit" until he has filed the required written notice.

We do not agree with the district court that the filing of such a notice would have been a "futile" act.[10] Filing such a notice serves two purposes. First, the employee gives official notice that he has some prior public service and that he desires to make appropriate contributions to receive credit for it in the County system. Second, the entire Board is put on official notice of the employee's intentions so that it may make a thorough investigation of the prior service and so that the amount of the contribution may be computed. Cantwell's oral communications with the administrator of the County system simply do not satisfy the statutory mandate that "a county employee must affirmatively elect to apply for and receive credit for prior public service." *Los Angeles County Firefighters, Local 1014 v. Board of Retirement,* 46 Cal. App. 3d 762, 768 (1975).

It is true that the Board would have, and subsequently did, deny Cantwell's request. The purposes behind the

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[10]We agree with the district judge that under the facts of this case, Cantwell could not assert estoppel against the County. This is true whether we apply California law, as the district court did, *see Strong v. County of Santa Cruz,* 543 P.2d 264, 266 (Cal. 1975); *City of Long Beach v. Mansell,* 476 P.2d 423, 442 (Cal. 1970), or federal law, *see Oki v. I.&N.S.,* 598 F.2d 1160, 1162 (9th Cir. 1979); *United States v. Ruby Co.,* 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); *Santiago v. I.&N.S.,* 526 F.2d 488, 491 (9th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 971 (1976).

statutory requirements are satisfied, however, only by compliance therewith.

We agree that the earliest possible date at which the County could have approved Cantwell's written request is the correct date for discontinuing Cantwell's contributions. That is the date on which Cantwell could have actually made the appropriate contributions, and thus would "have [the] credit" necessary for discontinuance of deductions under Cal. Gov't Code § 31625.2.[11]

Between August 17, 1974, the date as of whch the district court ordered a refund of Cantwell's contributions, and December 11, 1975, the date we have determined is the appropriate date from which the refund should be given, deductions from Cantwell's salary totalled $2,596.35. The district court ordered the County to refund $7,094.73, plus interest, to Cantwell. Subtracting $2,596.35 from that amount, leaves a refund due of $4,498.38, plus interest.

IV

Cantwell requested that the district court award him $4,000 in attorneys' fees. The court denied the request for several reasons, none of which Cantwell challenges on appeal. Instead, Cantwell proposes for the first time on appeal a system for apportioning the fees. His suggestion is that as the first nineteen members of the County

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[11]In using the earliest possible date at which the Board could approve an employee's request, the Board is prevented from unreasonably delaying in taking action upon a request. Of course, in the majority of cases, request for credit for prior service is made before the 30 years' service, including the prior service, has expired, and thus there will be no such problem.

retirement system who have backgrounds similar to Cantwell's elect to receive credit for their service, they also be required to contribute one-twentieth of Cantwell's fees, to be remitted to Cantwell.[12] Aside from the fact that this suggestion was neither presented to nor considered by the district court, it has serious flaws.

The only tenable theory upon which such a fee award could be made would be the common benefit exception to the general rule against allowance by the federal courts of attorneys' fees. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 257, 264-65 n.39 (1975). This court has set forth criteria for an award of fees under such a theory:

> The common benefit exception . . . applies where a litigant confers a substantial benefit on an easily identifiable class of persons, where the benefits can be traced with reasonable accuracy, and the costs of litigation can be shifted with some exactitude, to those benefiting.

Stevens v. Municipal Court, 603 F.2d 111, 112 (9th Cir. 1979).

At least two of the above factors are absent in the present case. The class of persons benefited is not easily ascertainable. The decision in this case will affect all county employees in the entire state of California, a fact which Cantwell apparently overlooks. There is no ready way to identify all the employees who might be able to avail themselves of section 1336. More importantly, for

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[12]Cantwell estimates there are approximately twenty county employees similarly situated thus the one-twentieth figure. No basis in fact is given for this estimate.

the same reason, there is no method of shifting the costs with some exactitude. Requiring only the first nineteen county employees who elect to receive credit to contribute toward the fees will result in their paying a far higher amount than their proportionate share. That alone would be enough to deny Cantwell's request.

In addition, Cantwell's proposal raises serious jurisdictional questions because none of the other affected employees are parties to this case or have filed similar cases in federal court. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 765-66, 771-72 (9th Cir. 1977). There would also be problems with the fact that the other employees would be personally contributing to Cantwell's fees, rather than having the award come from an easily identifiable fund. *See id.* at 770. *See also National Association for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387, 392 (D. D.C. 1975).

For all the above reasons, we affirm the district court's denial of Cantwell's original motion for allowance of attorneys' fees, and we reject Cantwell's new proposal.

V

We conclude that the district court was correct in determining that 10 U.S.C. § 1336 prevails over sections of the California Government Code governing county retirement systems. We modify the district court's order requiring the County to refund $7,094.73, plus interest, to Cantwell, upon his making the appropriate contribution for prior service. The County is required to grant Cantwell credit for his prior service upon Cantwell's contribution of $3,065.04, and to refund to Cantwell $4,498.38, plus

interest. Of course, the amounts may be offset upon Cantwell's being granted the credit. We affirm the district court's denial of attorneys' fees.

As modified, the judgment is affirmed and remanded to the district court for computation of interest.

Appendix B

In the United States District Court
For the Northern District of California

Civil No. 76-1258 GBH

Sidney H. Cantwell, Jr.,
Plaintiff,
v.
County of San Mateo, a political subdivision of the State of California, and The Retirement Board of San Mateo County,
Defendants.

[Filed Sept. 20, 1977]

MEMORANDUM OF DECISION

Plaintiff seeks a declaration that, pursuant to 10 U.S.C. § 1336, he is entitled to receive credit toward his San Mateo County Employee's Pension for the period of time plaintiff spent in active United States Navy service, providing that plaintiff makes the cash contribution to the County Pension System necessary to obtain such credit. Defendants contend that to award such credit would grant plaintiff a double pension for the service in contravention of California Government Code §§ 31641.4 and 31836.

The parties have agreed to submit this matter to the court for decision on the basis of a Stipulation of Agreed Statement of Facts and memoranda of law, all of which have now been filed.

FACTS

The facts here are not in dispute and are contained in detail in the Stipulation of Agreed Statement of Facts filed herein on February 14, 1977. The pertinent background may be summarized as follows:

Plaintiff resides in Menlo Park, County of San Mateo, California, and is employed by the county as County Engineer.

Plaintiff was born on October 19, 1922. He enlisted in the United States Navy in September 1942 and entered active Navy service on January 6, 1946 for a total of 3 years, 8 months and 27 days of active service. Subsequent to his leaving active Navy service on October 3, 1946, plaintiff served in the United States Naval Reserve until October 1968. Plaintiff's total active and reserve Naval service was 26 years and 1 month.

In April 1948 plaintiff entered employment of the County of San Mateo and has worked continuously as an employee of the county since that time. Plaintiff became a member of the San Mateo County Employees Retirement Association on May 14, 1948 and continues to be a member of that Association; as such, he is entitled to the benefit of the County Employees Retirement Law of 1937 (California Government Code §§ 31450-31898).

Plaintiff claims that he has the right under §§ 31641.1 and 31641.2 of the County Employees Retirement Law of 1937 and under 10 U.S.C. § 1336 to make contributions to the San Mateo County Employees Retirement System so as to receive credit on his San Mateo County pension for time spent in active Navy service.

Plaintiff would be required to contribute $3,065.14 to the San Mateo County Employees Retirement System in order to receive credit toward his San Mateo County Employees pension if he were permitted to make such contribution.

Defendant Retirement Board of San Mateo County has denied plaintiff the opportunity to make contributions to the San Mateo County Employees Retirement System for time spent by plaintiff in active Navy service and has refused to allow plaintiff credit for retirement and pension purposes for such active service. This denial has been based in part upon defendant's interpretation of California Government Code § 31641.4, and in part upon plaintiff's failure to submit to the Retirement Board information indicating that no pension or retirement allowance will accrue to plaintiff for his service in the Navy, which information defendant Retirement Board of San Mateo County contends is required to be submitted to it by plaintiff under California Government Code § 31641.4.

The rules and regulations of the San Mateo County Employees Retirement Association provide that, in accordance with California Government Code § 31625.2, contributions shall not be deducted from the salary of any member of the San Mateo County Employees Retirement System who has credit for thirty years' service, providing such member was a member of the System on the effective date of § 31625.2 and remained in membership continuously until credited with thirty years' service. Regulation VI-D of the Retirement Board of San Mateo County provides:

> In determining whether a member of the Retirement System has credit for thirty years continuous service,

> the definition contained in Section 31642 of the [California] Government Code shall be utilized both for County service and for prior public service.

Plaintiff was a member of the San Mateo Employees Retirement System on the effective date of § 31625.2.

Plaintiff has not been employed by the County of San Mateo for 30 years, nor has he been a member of the San Mateo County Employees Retirement System for 30 years. If, however, plaintiff is given credit for his active Navy service toward his employment with the County of San Mateo, that active Navy service when added to his service in the employment of the County of San Mateo totalled 30 years on August 17, 1974.

DISCUSSION

At issue here are plaintiff's pension rights in light of a posited conflict between state and federal law. The pertinent statutes and regulations are set forth hereinbelow.

California Government Code § 31641.4 reads:

> A member shall receive credit for employment in public service only for such service as he is not entitled to receive a pension or retirement allowance from such public agency. The service for which he elects to contribute and the fact that no pension or retirement allowance will accrue to such member by virtue of his employment in such public agency must be certified to by an officer of the public agency where he rendered such public service or must be established to the satisfaction of the board.

California Government Code § 31479 defines "public service" as:

> [S]ervice rendered as an officer or employee of a public agency for which service the officer or employee received compensation from the public agency and with respect to which he is not entitled to receive credit in any retirement system supported wholly or in part by public funds after he becomes a member of this system.

California Government Code § 31836 provides in pertinent part:

> No credit shall be granted in this retirement system for service for which the member has received credit in another retirement system or for which he is presently receiving a retirement allowance from another retirement system.

Ten U.S.C. § 1336 provides:

> No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.

Defendants take the position that plaintiff cannot receive credit for his active military service under California Government Code §§ 31641.4 and 31836 because plaintiff is entitled to receive a retirement allowance (from the Navy) for such service; that plaintiff's active military service is not "public service" within the meaning of the California statutes above cited; plaintiff has failed to provide the

necessary certification required by California Government Code § 31641.4; that 10 U.S.C. § 1336 is inapplicable because plaintiff's service is not "otherwise properly credited" under that statute; that 10 U.S.C. § 1336 should be interpreted to apply only to federal and not state civilian service; that if interpreted as plaintiff suggests, 10 U.S.C. § 1336 would violate state sovereignty; and, finally, even if plaintiff is eligible to receive credit for his active military service, he is not entitled to have his contributions to the county retirement system discontinued.

Plaintiff argues that he is not disqualified by California Government Code § 31641.4 because, since he has yet to reach age 60, he is not "entitled to receive a pension or retirement allowance" from the Navy within the contemplation of the statute; that even if § 31641.4 were applicable, it would be unconstitutional as to him because in conflict with the policy and language of 10 U.S.C. § 1336; and that plaintiff is entitled to have his contributions discontinued because he has in fact accrued 30 years of service by adding his active military service to that of his employment with the County of San Mateo.

1. Is Plaintiff Entitled to Credit for His Active Military Service Under California Government Code § 31641.4?

Defendants contend that plaintiff is precluded from electing to receive credit for his active military service under the cited California statutes because the latter service is not "public service" as defined in California Government Code § 31479; this is because plaintiff is "entitled" to receive credit for that service from the Military Retirement System which is "supported . . . by public funds."

Plaintiff counters by interpreting "entitled to receive a pension or retirement allowance from such public agency" in California Government Code § 31641.4 as meaning present entitlement, i.e., since plaintiff's military pension will not be payable until and unless he reaches 60, he cannot be considered "entitled" to it before that time.

The language of § 31641.4, including the reference in the second sentence thereof to the requirement for certifying that "no pension or retirement allowance will accrue to such member by virtue of his employment in such public agency," supports the position taken by defendants. Plaintiff is "entitled" to a Navy pension, within the intendment of § 31641.4, even if payments will not be made to him until he reaches the age of 60. Furthermore, plaintiff has not provided the certification specified by § 31641.4, and in light of the facts cannot, but such failure is immaterial in view of the court's decision below on the primacy of 10 U.S.C. § 1336.

2. Even if California Government Code § 31641.4 Is Applicable to Plaintiff, Is He Nevertheless Entitled to Make Contributions Thereunder for His Active Military Service by Virtue of 10 U.S.C. § 1336?

Ten U.S.C. § 1336 manifests a federal policy aimed at encouraging and rewarding participation in reserve military forces. To this end, § 1336 mandates that one entitled to a military pension may have the service therefor also credited towards eligibility for any other pension accruing from civilian employment. As the court opined in *Merrill v. United States,* 338 F.2d 372, 375 (Ct.Cl. 1964):

> The retirement system established by section 1331 was created in 1948, as Title III of Public Law 810, for non-regular and reserve service. [Footnote.] "Title III establishes a new basis for payment of retirement pay for longevity to members and former members of reserve components, credit being authorized for active duty together with limited credit for service other than active duty. It was a statute to provide for retirement pay at a specified age to those members and former members of reserve components who had certain service and theretofore were not eligible for retirement except for disability." 41 Comp. Gen. 458, 459 (1962). The primary mechanism was to grant retirement pay to reserve and National Guard servicemen who accumulated sufficient points from drills, annual periods of training, military courses, and similar reserve-type activities. The purpose was "to provide an inducement to members of reserve components to remain active in the Reserve over a long period of time thereby providing a better trained and more ready Reserve to meet the needs of our national defense structure." Ibid. One of the specific inducements to these part-time servicemen (many of whom worked for the federal government) was to allow them to count concurrent periods of federal civilian service and of military duty for both civilian and military retirement.

Contrary to the position taken by defendants, the phrase "on account of civilian employment by the United States *or otherwise*" (emphasis added) includes employment, as here, by a state or its subdivision as well as by the federal government. The parenthetical contained in the *Merrill* case, that many of those who were reservists also worked as civilians for the federal government, in no way limited the application of § 1336 to such persons only.

The central issue here is whether California Government Code § 31641.4 can be harmonized with 10 U.S.C. § 1336 in this instance and, if it cannot, which prevails.

Despite the attempts of both sides to avoid the language of one or the other of the statutes, it is patent that § 1336 authorizes double credit for service while § 31641.4 denies the same. In the event of such conflict, the Supremacy Clause of the United States Constitution, Article VI, Clause 2, declares that the federal law must prevail. *See, e.g., Free v. Bland,* 369 U.S. 663, 666, 668 (1962); *United States v. Brown,* 552 F.2d 817, 821 (8th Cir. 1977). As the Supreme Court recently concluded in *Jones v. Rath Packing Co.,* 97 S.Ct. 1305, 1309 (1977):

> Congressional enactments that do not exclude all state legislation in same [sic] field nevertheless override state laws with which they conflict. * * * Our task is "to determine whether under the circumstances of this particular case [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citation omitted.]

Under the *Rath* test, the Congressional policy of encouraging and rewarding military reserve service, as evidenced by the language of § 1336, would be frustrated in this instance if the California statutes achieved the result argued for by defendants.

Defendants cite *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465 (1976) in support of the argument that § 1336 cannot be applied as plaintiff suggests without violating the state's sovereignty in contravention of the Tenth Amendment. *National League of*

Cities involved a suit challenging those portions of the Fair Labor Standards Act which required employers to pay certain minimum hourly wages and one and one-half times regular pay for hours worked in excess of forty per work week. Originally, the states and their subdivisions were excluded from FLSA coverage, but by 1974 Congress extended the minimum wage and maximum hour provisions to most public employees employed by the states and their political subdivisions. The plaintiffs challenged the provisions for infringing a constitutional protection running in favor of the states as states. 426 U.S. 845.

The Court, through the 5-4 majority opinion of Justice Rehnquist, held that insofar as the FLSA amendments directly displaced the states' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Article I, Section 8, Clause 3. That this was the limit of what the Court was deciding was made clear at footnote 17, *Id.* at 852:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

As subsequent lower court decisions demonstrate, *National League of Cities* is not to be read expansively, but is instead to be limited to the statutory context before it there, namely the extent of the power granted Congress by Article I, Section 8, Clause 3. *See Dupler v. City of*

Portland, 421 F.Supp. 1314 (D. Maine 1976); *City of Boston v. Hills,* 420 F.Supp. 1291, 1298 (D. Mass. 1976); *Christensen v. State of Iowa,* 417 F.Supp. 423, 425 (N.D. Iowa 1976). *National League of Cities* provides no authority for limiting power exercised by Congress under such sections of the Constitution as Article I, Section 8, Clauses 12 and 13, pursuant to which 10 U.S.C. § 1336 was adopted.

Justice Blackmun's concurrence in *National League of Cities, Id.* at 856, is instructive here, for he wrote in pertinent part:

> Although I am not untroubled by certain possible implications of the court's opinion—some of them suggested by the dissents—I do not read the opinion as despairingly as does my brother Brennan. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. See *Ante* 2474-2475. With this understanding on my part of the court's opinion, I join it.

To the extent that a "demonstrably greater federal interest" justifies federal pre-emption, it unquestionably exists in the instant case. The defendants' position has abstract merit, particularly in view of the understandable public concern about "double dipping," but Congress has spoken on a matter of vital national and international

interest, and this court is not free to disregard that expression.

3. Is Plaintiff Entitled to Have His Contributions to the Retirement System Discontinued?

Defendants argue that even if plaintiff is entitled to make contributions and receive credit for his active military service, he is nevertheless not entitled to have contributions to the County Retirement System discontinued.

Defendants cite California Government Code §§ 31625.2, 31835 and 31836.1 in support of their position.

California Government Code § 31625.2 reads:

> Notwithstanding any other provisions of this chapter, contributions shall not be deducted from the salary of any member having credit for 30 years' service providing such member was a member on the effective date of this section and remained in membership continuously until credited with 30 years' service.

California Government Code § 31836.1 reads:

> "Service" for the purpose of qualifying members for the discontinuance of contributions pursuant to 31625.2 shall also include service as an employee of the state, a contracting agency under the Public Employees' Retirement System, of another county having a retirement system established under this chapter, or of any other public agency if the compensation for such service constitutes compensation earnable by a member under Section 31835.

Finally, California Government Code § 31835 reads:

> The average compensation during any period of service as a member of the Public Employees' Retirement System or a member of a retirement system established under this chapter in another county shall be considered compensation earnable by a member for purposes of computing final compensation for such member provided:
>
> (1) The period intervening between active memberships in the respective systems does not exceed 90 days.
>
> (2) He retires concurrently under both systems and is credited with such period of service under such other system at the time of retirement.

Defendants argue that because the period intervening between plaintiff's active membership in the Navy and his employment with the County of San Mateo exceeded 90 days, the compensation for his active military service does not constitute compensation earnable by plaintiff under § 31835, and therefore plaintiff cannot include his active military service for the purpose of qualifying for the discontinuance of contributions pursuant to California Government Code § 31625.2.

The crucial inquiry here is whether plaintiff has 30 years' service. Such service includes not only his employment with the county, but also his service with another public agency, namely the Navy, provided such service is credited toward the pension which plaintiff is entitled to receive under the county pension plan.

California Government Code § 31641 defines such service as, inter alia:

(b) In military service for which the county or district or member is authorized by other provisions of this chapter to make, and does make such contributions.

If, as the court has found, plaintiff is authorized by 10 U.S.C. § 1336 to make contributions towards his county pension for his active military service, then that active service is also "service" within the definition of § 31641. The more restrictive definition of "service" contained in § 31836.1 does not disqualify plaintiff, for the use of the words "shall also include" in that statute indicates that it supplements, but does not supplant, the definition of "service" contained in § 31641.

Accordingly, the court finds for plaintiff and concludes that judgment shall be for plaintiff. Plaintiff is hereby directed to submit a form of judgment consistent with the foregoing.

It is so ordered.

Dated: 20 SEP 1977

/s/ GEORGE B. HARRIS

United States District Judge

Appendix C

Law Office of
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1075 Curtis Street
Menlo Park, CA 94025
Phone: 415/328-4500
Attorney for Plaintiff

In the United States District Court
For the Northern District of California

Civil No. 76-1258 GBH

Sidney H. Cantwell, Jr.,
Plaintiff,

v.

County of San Mateo, a political subdivision of the State of California, and The Retirement Board of San Mateo County,
Defendants.

[Filed October 20, 1977]

JUDGMENT IN FAVOR OF PLAINTIFF FOR DECLARATORY RELIEF

The complaint of SIDNEY H. CANTWELL, JR., plaintiff, and the answer of defendant COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY, having been submitted by the parties to the court for its decision on the basis of the parties' written

Stipulation Of Agreed Statement Of Facts and Memoranda Of Law which have been filed by the parties, and the court having filed its Memorandum Of Decision, wherein it has concluded that plaintiff is entitled to the declaratory relief prayed for in his complaint, the court now makes its judgment of declaratory relief in accordance with its Memorandum Of Decision.

IT IS ADJUDGED AND DECREED BY THE COURT that:

1. Under the Supremacy Clause of Article VI, Clause 2, of the Constitution of the United States, the provisions of 10 U.S.C. § 1336 which permit plaintiff SIDNEY H. CANTWELL, JR., to receive credit for his active Navy service toward his San Mateo County Employees Retirement System pension, prevail over the conflicting provisions of California Government Code § 31641.4, which section would preclude plaintiff from receiving credit for his active Navy service toward his San Mateo County Employees Retirement System pension.

2. Plaintiff, Sidney H. Cantwell, Jr., is therefore entitled to receive credit under 10 U.S.C. § 1336 toward his San Mateo County Employees Retirement System pension for the three years, eight months and twenty-seven days plaintiff served in the active service of the United States Navy between January 6, 1943 and October 3, 1946, upon his contributing $3,065.04 to his account in that System.

3. Defendants, The Retirement Board of San Mateo County and the County of San Mateo, are ordered to accept the contribution from plaintiff of $3,065.04 and upon its payment by plaintiff, to credit it to plaintiff's account in the San Mateo County Employees Retirement System and

to give plaintiff credit toward his San Mateo County Employees Retirement System pension for the three years, eight months and twenty-seven days of plaintiff's active United States Navy service.

4. For the reason that plaintiff's active Navy service is "service" for which plaintiff is authorized by 10 U.S.C. § 1336 to make contributions toward his San Mateo County Employees Retirement System pension, such active Navy service is also "service" within the definitions of California Government Code § 31625.2 and § 31641(b), provided that plaintiff does in fact contribute $3,065.04 to the San Mateo County Employees Retirement System. If and when plaintiff contributes $3,065.04 to that System, the defendants are ordered to add plaintiff's active United States Navy service of three years, eight months and twenty-seven days to his County service and to thereupon credit plaintiff with thirty years of total service with the County of San Mateo and pursuant to 10 U.S.C. § 1336 and California Government Code § 31641(b) to credit plaintiff with thirty years of membership in the San Mateo County Employees Retirement System, retroactively to and as of August 17, 1974.

5. For the reason that the plaintiff was a member of the San Mateo County Employees Retirement System on the effective date of California Government Code § 31625.2, then upon plaintiff's contributing $3,065.04 to that System and his being credited with thirty years of San Mateo County service and thirty years of membership in that System, as directed above, the defendants are ordered pursuant to the provisions of California Government Code § 31625.2 to make no further deductions from plaintiff's

salary for contributions to that System and the defendants are further ordered not to require the plaintiff to make any further contributions to that System so long as plaintiff remains in the employ of the County of San Mateo.

6. Upon plaintiff's contributing $3,065.04 to the San Mateo County Employees Retirement System, the defendants are further ordered to reimburse to plaintiff the $4,820.65 of contributions which have been deducted from plaintiff's San Mateo County salary and have been contributed to his account in the San Mateo County Employees Retirement System between August 17, 1974 and December 31, 1976, and to further reimburse plaintiff for deductions made from his San Mateo County salary and contributed to his account in that System after December 31, 1976 to the date of this Judgment.

Dated: 20 Oct 1977

/s/ GEORGE B. HARRIS

United States District Judge

Appendix D

In the United States District Court
For the Northern District of California

Civil No. 76-1258 GBH

Sidney H. Cantwell, Jr.,
Plaintiff,
v.
County of San Mateo, a political subdivision of the State of California, and The Retirement Board of San Mateo County,
Defendants.

[Filed Dec. 14, 1977]

ORDER

On September 20, 1977, this court filed its MEMORANDUM OF DECISION in this matter, finding for plaintiff and directing plaintiff to submit a form of judgment consistent with the court's decision. Plaintiff submitted a form of judgment, to which defendants noted their disapproval. Defendants also submitted their own proposed form of judgment.

On October 20, 1977, this court signed and filed the form of judgment proposed by plaintiff. Defendants are now before the court on their motion to amend said judgment.

Defendants' motion is premised on two arguments. First, defendants argue that plaintiff has sought and is therefore entitled only to declarative relief, and that, under the

terms of 28 U.S.C. §2202, the monetary relief awarded by the court can properly come only after reasonable notice and a hearing.

Second, defendants claim that the judgment should be amended because it is not consistent with the court's MEMORANDUM OF DECISION: to wit, that plaintiff is not entitled to have his contributions discontinued as of August 17, 1974, but rather that such contributions cannot be discontinued until plaintiff makes the required contributions for his active military service to bring his total years of service to thirty or more.

Plaintiff counters that the prayer of his complaint sought the precise relief awarded here, and that paragraph 19 of the Stipulation of Agreed Statement of Facts further supports the position that both parties recognized what contributions plaintiff made to the San Mateo County Employees Retirement System. Plaintiff also argues that the direction in paragraph 6 of the judgment is consistent with the court's MEMORANDUM OF DECISION and that defendants should not be able to thwart plaintiff's claims because they improperly refused to permit him to make the challenged contributions.

Although it appears that defendants were well aware of the amount contributed by plaintiff to the San Mateo County Employees Retirement System between August 17, 1974 and December 31, 1976, and therefore of the amount plaintiff was claiming as reimbursement in this action, nevertheless the court deems it the safer course to provide a hearing on the matter as requested by defendants.

Accordingly, a hearing is hereby calendared in this matter for Tuesday, January 17 at 10 a.m. The two issues to be argued at such hearing are: (1) What amount, if any, plaintiff is entitled to by way of damages; and (2) As of what date plaintiff is entitled to have his contributions discontinued.

If the parties desire to submit any further legal arguments and/or authorities, the same should be filed in accordance with Local Rules 220-2 and 220-3.

Accordingly, defendants' motion to amend is hereby granted, and paragraph 6 of the judgment heretofore filed by the court is hereby vacated. It is so ordered.

Dated: 14 Dec 1977

/s/ GEORGE B. HARRIS

United States District Judge

Appendix E

In the United States District Court
For the Northern District of California

Civil No. 76-1258 GBH

Sidney H. Cantwell, Jr.,
Plaintiff,
v.
County of San Mateo, a political subdivision of the State of California, and The Retirement Board of San Mateo County,
Defendants.

[Filed Jan. 30, 1978]

ORDER FIXING CERTAIN TERMS OF FINAL JUDGMENT

I. *Procedural History*

On September 20, 1977, this court filed its MEMORANDUM OF DECISION in this matter, finding for plaintiff and directing plaintiff to submit a form of judgment consistent with the court's decision. Plaintiff submitted a proposed form of judgment, but defendants noted their disapproval thereto and submitted their own proposed form of judgment.

Defendants' Notice of Disapproval of Proposed Judgment, filed on October 20, 1977, argued that the plaintiff's proposed judgment awarded relief, including damages, beyond that requested by plaintiff. Defendants also argued

that, under 28 U.S.C. § 2202, plaintiff was not entitled to any such award of damages except upon reasonable notice and after a hearing. In particular, defendants objected to paragraph six of the plaintiff's proposed judgment, which paragraph read:

> 6. Upon plaintiff's contributing $3,065.04 to the San Mateo County Employees Retirement System, the defendants are further ordered to reimburse to plaintiff the $4,820.65 of contributions which have been deducted from plaintiff's San Mateo County salary and have been contributed to his account in the San Mateo County Employees Retirement System between August 17, 1974 and December 31, 1976, and to further reimburse plaintiff for deductions made from his San Mateo County salary and contributed to his account in that System after December 31, 1976 to the date of this Judgment.

On October 20, 1977, this court signed and filed the form of judgment proposed by plaintiff. On October 28, 1977, defendants filed their motion to amend said judgment.

By its Order filed on December 14, 1977, this court granted defendants' motion to amend by vacating paragraph six of its judgment and, in addition, granted defendants' request for a hearing on the following two issues: (1) What amount, if any, plaintiff is entitled to by way of damages; and (2) As of what date plaintiff is entitled to have his contributions discontinued. The court also granted leave to the parties to file additional memoranda of law.

Defendants filed their memorandum of law on December 27, 1977, and plaintiff responded by filing his Motion for

Further Relief Pursuant to 28 U.S.C. § 2202, on January 3, 1978. Defendants filed their reply memorandum on January 12, 1978.

The hearing ordered by the court was duly held on January 17, 1978, at which all parties appeared by counsel and at which oral argument was given. The matter was thereafter submitted for decision by the court.

II. *Discussion*

A. As of What Date is Plaintiff Entitled to Have His Contributions Discontinued?

The first substantive issue before the court concerns the proper date as of which plaintiff is entitled to have his contributions to the San Mateo County Employees Retirement System discontinued. The parties agree that whatever damages plaintiff is entitled to can be calculated as a matter of undisputed mathematics once the date for discontinuance is fixed.

In their memorandum filed on December 27, 1977, defendants state their belief "that the amount of damages in this case can and should be calculated by determining the date upon which plaintiff makes or could have made the required contributions for his active military service if the defendants had not refused to allow him to do so; . . . ." Defendants argue that this date should not be earlier than December 11, 1975, the first meeting of the Board of Retirement after plaintiff requested in writing to receive credit for his military service and the first meeting at which the Board could have approved his request.

Defendants take the position that California Government Code § 31625.2 authorizes discontinuance of a member's contributions only when he is credited with thirty years' service, but here plaintiff did not even submit a written request to receive the same until November 17, 1975. Defendants also cite Government Code § 31641.1 which, they contend, requires that plaintiff have filed a written notice of his election to receive credit for his military service with the defendants before he could make the necessary contributions.

Plaintiff argues, on the contrary, that he is entitled to have his contributions discontinued as of August 17, 1974, the date on which plaintiff accrued the required thirty years of combined service. Plaintiff contends that at all times prior to August 17, 1974, he was willing and able to make the contributions necessary to receive credit for his military service, but that the defendant Retirement Board, through its agent Ross Conti, made it clear that favorable action would not be taken on his application therefor. Plaintiff has submitted an affidavit in which he identifies Ross Conti as the Treasurer of San Mateo County and the Administrator of the San Mateo County Employees Retirement System. Plaintiff avers that on at least three occasions between 1967 and 1973 he told Conti that he believed he should be permitted to contribute to the Retirement System the funds necessary to entitle him to receive credit toward his county pension for his active military service, but that Conti replied to him that he would not be entitled to receive credit therefor.

Based upon the foregoing, plaintiff concludes that defendants are estopped from invoking the provisions of

Government Code § 31641.1 because of the misrepresentations made by Conti on behalf of the defendants. Plaintiff points out that he could not have filed the written request required by Government Code § 31641.4 because he could not in fact certify that no other pension would accrue to him. In view of the attitude taken by Conti, argues plaintiff, the filing of the written claim would have been a useless act.

1. Estoppel against the Defendants

The doctrine of equitable estoppel occupies a secure place in equity jurisprudence. Its purpose was summarized in *Strong v. County of Santa Cruz*, 15 Cal.3d 720, 725, 125 Cal.Rptr. 896, 543 Pac.2d 165 (1975):

> The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment.

The traditional elements required for the application of equitable estoppel were set forth in *Driscoll v. City of Los Angeles*, 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 431 Pac.2d 245 (1967):

> 1. The party to be estopped must be apprised of the facts.
>
> 2. He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;

3. The other party must be ignorant of the true state of the facts; and

4. He must rely upon the conduct to his injury.

City of Long Beach v. Mansell, 3 Cal.3d 462, 493, 91 Cal.Rptr. 23, 476 Pac.2d 423 (1970) makes it clear that although estoppel may be applied against the government when right and justice require, nevertheless the doctrine is inapplicable if it would result in the nullification of a strong rule of policy adopted for the benefit of the public. *Strong v. County of Santa Cruz, supra* at 725.

It is manifest that plaintiff cannot satisfy his burden of establishing the prerequisites necessary for the application of equitable estoppel.

First, the defendants were not "apprised of the facts" if said "facts" were that, as a legal conclusion, federal law pre-empted state statutory law on the matter. The only representations made by Ross Conti related to his understanding of state law; plaintiff does not contend that Conti acted in bad faith, or purposely or even negligently misled him.

Conti was evidently not even aware of the federal statute upon which plaintiff based the instant action until plaintiff wrote to the Retirement Board on November 17, 1975. That Conti's advice proved incorrect was not a "fact," but rather became true ex post facto when this court ruled, for the first time, that federal law superseded state law on the issue in question. This is not, then, one of those cases where a governmental agency is estopped from asserting a statutory claim requirement because the time or

necessity for filing has been misrepresented, or because the plaintiff has been told he needed no legal counsel.

Second, there is serious doubt whether plaintiff can bring himself within the traditional principles of equitable estoppel where the representation complained of is one of law rather than fact. It is the general rule in California that misrepresentations as to matters of law will not raise an estoppel. *Champion v. Woods*, 79 Cal. 17, 20, 21 Pac. 534 (1889); *Robbins v. Law*, 48 Cal.App. 555, 560, 192 Pac. 118 (1920). The basis for this distinction is that whereas the party to be estopped may be in exclusive possession of the facts, it is equally available to either party to seek the advice of counsel and obtain a legal opinion if the same be necessary. *See People v. Stuyvesant Ins. Co.*, 261 Cal.App.2d 773, 784, 68 Cal.Rptr. 389 (1968). The same result obtains even where there is a mutual mistake as to the law. *Id.*

There is language in the cases that an expression of opinion as to a matter of law may support an estoppel where one party actually has special knowledge or where the parties are in a confidential relationship. *See Gilbert v. City of Martinez*, 152 Cal.App.2d 374, 378, 313 Pac.2d 139 (1957).

In the instant case, however, defendants had no "special knowledge" of the kind required to work an estoppel, and plaintiff has cited no authority supporting his contention that Ross Conti occupied a confidential relationship as to him.

Third, although estoppel may be invoked against a governmental agency in California under proper circum-

stances, this will not be true where to do so would do violence to a strong policy adopted for the benefit of the public. Under the cases, the policy embodied in the California statutes at issue here do evidence such a policy, namely, the provision for public employees' pensions while not encouraging double pensions based upon the same service. The policy furthered by the substantive decision earlier reached by this court is one which furthers a broader, national interest rather than one embodied in California law.

Accordingly, we find that defendants are not estopped from asserting plaintiff's failure to follow the claim and notice requirements set forth in the applicable California Government Code sections.

2. Undertaking a Useless Act

Plaintiff posits a second reason excusing his failure to follow the claim and notice procedure, namely that to do so would have been a futile act.

In this assertion plaintiff is correct. On at least three separate questions he asked Ross Conti whether he could contribute to receive credit for his active military service toward his county pension, and in each instance Conti told him that it would be to no avail. Defendants argue that plaintiff should have filed a written request anyway, apparently in the belief that the Retirement Board could then have acted favorably on it. We know, however, that it was not the policy of the Board to so act, and that in fact the Board denied his application when it was submitted on November 17, 1975 and again in late 1977 *after this court had ruled in his favor.*

It is clear, then, that a written application by plaintiff would have brought him no relief and therefore must be excused. Equity has long recognized the maxim codified in California Civil Code § 3532: "The law neither does nor requires idle acts."

Accordingly, plaintiff is entitled to have his contributions discontinued as of August 17, 1974, and he is entitled to damages by way of reimbursement for all amounts contributed thereafter.

B. Attorneys' Fees

Plaintiff, by his "Motion for Further Relief" filed on January 3, 1978, for the first time requested an award of attorneys' fees. Plaintiff cited cases which supported such award under the "private attorney general" theory, but at oral argument in the hearing on the matter plaintiff cited cases which supported award under the "substantial benefit" or "common benefit" approach.

It is clear that the cases cited by plaintiff in his memorandum of January 3, 1978, are inapposite in the present context, and that *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975), forbids the award of attorneys' fees in a federal case under the "private attorney general" approach.

As the *Alyeska* Court reiterated, the general American rule is that the prevailing litigant is not entitled to collect a reasonable attorneys' fee from the loser. 421 U.S. at 247. Absent statute or an enforceable contract, litigants ordinarily pay their own attorneys' fees. *Id.* at 257.

There are, however, exceptions, one of which is the "common benefit" or "substantial benefit" theory.

For a brief history of the development of the common benefit exception, see *Alderman v. Philadelphia Housing Authority,* 71 F.R.D. 187, 190 (E.D. Pa. 1976).

In *Mills v. Electric Auto-Life,* 396 U.S. 375, 389-390 (1970), the Supreme Court held that the petitioners, shareholders who had established violation of the securities law by their corporation and its officials, should be reimbursed by the corporation or its successor. The Court described the doctrine which would permit the award of attorneys' fees in such a situation:

> A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. [Citation omitted.] To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. 396 U.S. 392.
>
> • • •
>
> Other cases have departed further from the traditional metes and bounds of the doctrine to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. Id. at 393-394.
>
> • • •
>
> To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is

> not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit. *Id.* at 396-397.

See also Hall v. Cole, 412 U.S. 1, 6 n.7 (1972).

The *Alyeska* case affirmed the vitality of the common benefit exception. *Brennan v. United Steelworkers of America, Etc.,* 554 F.2d 586, 600 (3rd Cir. 1977).

Typically, the common benefit doctrine has been applied in the context of class-type suits, such as shareholder or union member actions. In those instances, even though attorneys' fees may be assessed against the corporation or union, such assessment in effect comes out of the "benefit pool" of the remaining shareholders or union members who will benefit by the decision.

The problem here is that plaintiff's request for attorneys' fees would not serve to distribute the costs of the litigation among its potential beneficiaries—other similarly-situated county employees—but would instead result in penalizing the defendants, i.e., working "to saddle the unsuccessful party with the expenses" in contravention of the language and spirit of the *Mills* case.

As the court noted in *Brennan v. United Steelworkers of America, Etc., supra* at 604-605, one of the considerations in evaluating a common benefit claim is whether "the costs may be shifted with some precision to those benefiting." Where, as here, the defendant receives no benefit, he cannot be charged with attorneys' fees. *See Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 770 (9th Cir. 1977); *Trinity Episcopal Schools Corp. v. Hills,* 422 F.Supp. 179,

181 (S.D. N.Y. 1976); *Coalition for L.A. County Etc. Interest v. Board of Supervisors,* 76 Cal.App.3d 241, 247 n.6, ... Cal.Rptr. ..... (1977).

Although the potential beneficiaries of this action may be identified, this cannot be done with certainty, and there is no viable way for the court to apportion the attorneys' fees sought here among them. Where no such apportionment is possible, attorneys' fees may not be awarded under the common benefit theory. *See, e.g., Writers Guild of America, West, Inc. v. F.C.C.,* 423 F.Supp. 1064, 1160-1161 (C.D. Cal. 1976); *Trinity Episcopal Schools Corp. v. Hills, supra* at 181; *Alderman v. Philadelphia Housing Authority supra* at 190-191.

This court is not entitled to assess attorneys' fees against the defendants simply because they may be the "most appropriate party." *Alderman v. Philadelphia Housing Authority, supra* at 191.

Also lurking in the record is the question whether this court could, in any event, award attorneys' fees in the face of the Eleventh Amendment. The Court in *Alyeska* recognized the problem of awarding attorneys' fees against state governmental entities and noted that the lower courts were divided on the question. 421 U.S. 269 n.44. *See also D. C. Federation of Civic Associations v. Volpe,* 71 F.R.D. 206, 211 (D. D.C. 1976).

Finally, even if this court were authorized to award attorneys' fees to plaintiff, it would rest within the discretion of the court to decline to do so. *See Ross v. International Broth. of Elec. Workers,* 544 F.2d 1022, 1025 (9th Cir. 1976).

For the foregoing reasons, the court denies plaintiff's application for the award of attorneys' fees in this matter.

The court will adopt and endorse the form of supplemental judgment lodged by plaintiff on January 5, 1978, except that no attorneys' fees will be awarded thereby.

Dated 30 JAN 1978

/s/ GEORGE B. HARRIS

United States District Judge

Appendix F

In the United States District Court
For the Northern District of California

Civil Action No. C76-1258 GBH

Sidney H. Cantwell, Jr.,
Plaintiff,

v.

County of San Mateo, a political subdivision of the State of California, and The Retirement Board of San Mateo County,
Defendants.

[Filed Jan. 30, 1978]

SUPPLEMENTAL JUDGMENT RENDERED PURSUANT TO 28 U.S.C. 2202 IN FAVOR OF PLAINTIFF, SIDNEY H. CANTWELL, JR., FOLLOWING ENTRY OF JUDGMENT OF DECLARATORY RELIEF

The court having, on October 20, 1977, filed its JUDGMENT IN FAVOR OF PLAINTIFF FOR DECLARATORY RELIEF, and the court having amended that JUDGMENT by its Order of December 14, 1977 wherein it vacates Paragraph 6 of that JUDGMENT, and pursuant to the December 14, 1977 Order and the Motion of Plaintiff for further relief pursuant to 28 U.S.C. 2202 having held a further hearing on January 17, 1978 on the issues of what amount, if any, plaintiff is entitled to

by way of damages and as of what date plaintiff is entitled to have his contributions to the San Mateo County Retirement System discontinued, at which hearing oral and documentary evidence was produced and written Points and Authorities submitted by plaintiff and defendants were considered, after which the matter was submitted and the court having thereafter entered its ORDER FIXING CERTAIN TERMS OF FINAL JUDGMENT, the court now makes its SUPPLEMENTAL JUDGMENT in accordance therewith, as follows:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. For the reason that in violation of plaintiff's rights under the laws of the United States the defendants refused to permit him to make contributions to his San Mateo County Employees Retirement System account prior to and after August 17, 1974, although plaintiff was ready, willing and able, and had requested of the defendants the right to make a contribution in an amount which would have entitled plaintiff to receive credit for his active Navy service toward his San Mateo County pension and toward service under the provisions of California Government Code Section 31625.2, plaintiff became entitled to the same benefits to which he would have been entitled had he been permitted to make such contributions. Among such benefits was the discontinuance as of August 17, 1974 of deductions from plaintiff's county salary for contribution to his County Retirement System account.

2. By reason of plaintiff's becoming entitled to the discontinuance of deductions from his San Mateo County

salary as of August 17, 1974 for contribution to his Retirement System account, the $7,094.73 which was deducted by the defendants from plaintiff's salary between August 17, 1974 and December 31, 1977, and which was contributed to and is now held in plaintiff's San Mateo County Employees Retirement System account should be returned to plaintiff immediately by defendant Retirement Board of San Mateo County, together with interest earned and credited on the amounts deducted pursuant to the rules and practice of the San Mateo County Employees Retirement System. In lieu of defendant Retirement Board of San Mateo County's repaying to plaintiff the $7,094.73 and interest thereon in cash, that defendant shall immediately do all of the following:

(a) Credit plaintiff's account in the San Mateo County Employees Retirement System with a contribution in the amount of $3,065.04, which is the amount which plaintiff was required to contribute to that System in order to receive credit for his active Navy service toward his San Mateo County Employees pension; and

(b) Credit plaintiff with an additional 3 years, 8 months and 27 days of service with the County of San Mateo for purposes of determining the pension which shall be due from the San Mateo County Employees Retirement System by reason of plaintiff's employment with the County of San Mateo; and

(c) Credit plaintiff with 3 years, 8 months and 27 days of service for purposes of determining his service under the provisions of California Government Code Section

31625.2 for discontinuing deductions from plaintiff's salary for contribution to the County Retirement System; and

(d) Pay to plaintiff $4,023.69 which is the difference between the $7,094.73 to which plaintiff is entitled and the $3,065.04 credit directed to be given to him under (a) above; and

(e) Pay to plaintiff $459.21 as interest on the deductions made from plaintiff's County salary between August 17, 1974 and December 31, 1977, being the 4½% per annum interest paid and credited on members' accounts under the System's regulations and procedures, providing the credit provided in (a) is given and the payment provided in (d) is made by June 30, 1978, and if such credit is not given and such payment is not made by that date, that defendant shall pay to plaintiff interest in the amount of $629.17 on the $7,094.73.

3. Defendants shall further repay to plaintiff all sums which are deducted from plaintiff's County salary and contributed to plaintiff's Retirement System account after December 31, 1977, together with interest on those sums calculated in accordance with the regulations and procedures of the Retirement System.

4. Defendants shall not pay any further amount to plaintiff as and for attorneys' fees.

Dated: 30 JAN 1978

/s/ GEORGE B. HARRIS

United States District Judge

Entered in Civil Docket 1-30-1978

No. 80-1272

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY,
Petitioners,

VS.

SIDNEY H. CANTWELL, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
to
Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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No. 80-1272

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY,
Petitioners,

VS.

SIDNEY H. CANTWELL, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
to
Petition For a Writ of Certiorari to the
United States Court of Appeals For the Ninth Circuit

REASONS WHY WRIT SHOULD BE DENIED

1. The decision of the Court of Appeal which Petitioners ask this Court to review is clearly not erroneous.

In reaching its decision the Court of Appeal adopted the reasoning of this Court in *Case v. Bowles,* 327 U.S. 92 (1946), and *Jennings v. Illinois Office of Education,* 589 F.2d 935 (7th Cir.), *cert. denied,* 441 U.S. 967 (1979). The decision of the Court of Appeals for the Fifth Circuit

in *Peel v. Florida Department of Transportation,* 600 F.2d 1070 (1979) also supports the decision of the Court of Appeal in the instant case.

Thus, the Court of Appeal in deciding here for the respondent was not charting a new course, nor was it acting in an area void of precedent. It was following established case law.

2. There is no conflict between the decision of the Court of Appeal in the instant case and any decision of this Court or of another Court of Appeal

In their petition the Petitioners cite no case decided by this Court or by any Court of Appeal which is in conflict with the decision of the Court below.

The Petitioners rely principally on *National League of Cities v. Usery,* 426 U.S. 833 (1976). Petitioners state at page 8 of their petition that the decision of the Court of Appeal "does conflict in principle with the reasoning of the *National League of Cities* decision." This is not so. The holding in the *National League of Cities* case is specifically limited to legislation enacted by Congress under powers conferred upon it by the Commerce Clause, Article I, Section 8, Clause 3. (426 U.S. at 852, fn. 17.)

The power which Congress exercised in enacting 10 U.S.C. Sec. 1336 was conferred upon Congress by Article I, Section 8, Clauses 12 and 13, which give Congress the power to raise and maintain armies and a navy. The Petitioners at page 7 of their petition concede that this Court expressly stated in the *National League of Cities* decision that nothing in that decision was intended to

address the scope of Congress' authority under its war power. (426 U.S. at 833, fn. 18.).

3. **The decision of the Court of Appeal does not frustrate the legitimate State purposes of prohibiting public employees from receiving credit in two public retirement systems for the same period of service rendered to only one public agency, as Petitioners assert in their petition**

The Court of Appeal states in its opinion:

> "We note parenthetically that California could have chosen not to afford credit for any prior public service. Having chosen to do so, however, it can not do so in a manner which conflicts with Sec. 1336." (petition-appendix APP 10 and 11)

Thus the decision of the Court below does not deprive the State of prohibiting employees from receiving credit in two public retirement systems for the same period of public service.

4. **The decision of the Court of Appeal is of doubtful importance.**

The Petitioners have not indicated in their petition what number of County employees will qualify for additional pension credit of the type Respondent will be entitled to receive under the Court of Appeal decision. Respondent in a declaration filed in the District Court estimated that the number would not exceed twenty. The County did not attempt to refute the correctness of this number. The information available to the Respondent is that since the entry of the judgment by the District Court less than six

County employees have sought to obtain credit for active military service toward their County pensions based upon the District Court's judgment.

Thus the financial burden which decision of the Court of Appeal will place on the County will certainly not be enormous.

Employees of the State of California, of many other counties, of numerous cities, districts, public agencies and authorities within the State, are members of the Public Employees Retirement System. That system is governed by rules different from the retirement system of which the Respondent is a member. The rules of that system specifically allow credit to its members for active military service of the type for which the Respondent has been allowed credit by the decision of the Court of Appeal.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Dated: February 12, 1981

Respectfully submitted,

HOWARD M. DASCHBACH, JR.
DONOVAN R. MARBLE
COUNSEL OF RECORD
Attorneys for Respondent